

STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

In the Matter of the Petition	:	
of	:	
<b>DAVID AND LESLIE BYCK</b>	:	DETERMINATION
		DTA NO. 823514
for Redetermination of a Deficiency or for Refund of New	:	
York State Personal Income Tax under Article 22 of the		
Tax Law for the Years 2003 and 2004.	:	

---

Petitioners, David and Leslie Byck, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 2003 and 2004.

On October 28, 2011 and November 4, 2011, respectively, petitioners, appearing pro se, and the Division of Taxation appearing by Mark F. Volk, Esq. (Peter B. Ostwald, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based upon documents and briefs to be submitted by March 30, 2012, which date began the six-month period for issuance of this determination. Pursuant to Tax Law § 2010 (3) the six month period was extended to nine months. After review of the evidence and arguments presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

***ISSUES***

I. Whether petitioners have shown that they were not domiciled in New York State during 2003 and therefore not taxable as resident individuals pursuant to Tax Law § 605(b)(1)(A).

II. Whether petitioners have shown that they were not present in New York State for more than 183 days during 2003 and therefore not taxable as resident individuals pursuant to Tax Law § 605(b)(1)(B).

III. Whether the Division of Taxation properly determined that petitioners failed to report the capital gain from the 2004 sale of their New York domicile located at Apricot Court, Melville, New York.

IV. Whether petitioners have established reasonable cause for the abatement of penalties

### ***FINDINGS OF FACT***

1. On March 5, 2009, following a field audit, the Division of Taxation (Division) issued to petitioners, David and Leslie Byck, a Notice of Deficiency asserting additional New York State personal income tax due for the years 2003 and 2004 in the aggregate amount of \$15,429.00 plus penalty and interest.<sup>1</sup> With respect to the year 2003, the Notice of Deficiency asserts \$15,117.00 in additional tax due, plus negligence penalty pursuant to Tax Law § 685(b) and interest. The deficiency for the year 2003 resulted from the Division's conclusion that petitioners were properly subject to tax as residents of New York State for that year. With respect to the year 2004, the Notice of Deficiency asserts \$312.00 in additional tax due, plus penalties for failure to file on or before the due date (Tax Law § 685[a][1]) and for negligence (Tax Law § 685[b]) and interest. The deficiency for the year 2004 resulted from the Division's conclusion that petitioners failed to file a nonresident income tax return reporting the capital gain from their sale of the Apricot Court, Melville, New York, townhouse.

---

<sup>1</sup> Petitioners executed two consents extending the period of limitations for assessment of personal income tax for the year 2003 until any time on or before April 15, 2009.

2. David Byck, who was born in 1973, filed New York State resident income tax returns for the years 1996 and 1997. On those New York resident returns, Mr. Byck listed a Maplewood Avenue, Plainview, New York, address.

3. In 1998, Mr. Byck began filing New York State resident income tax returns with his wife Leslie, who was born in 1974. Petitioners, David and Leslie Byck, listed a Joyce Road, Plainview, New York, address on their New York resident returns filed for the years 1998 through 2000. On their resident income tax returns filed for the years 2001 and 2002, petitioners listed their address as the East 35<sup>th</sup> Street, New York, New York, apartment owned by David Byck and his father, Stanley Byck, who purchased it some time in 1996.

4. Mrs. Byck was an investment adviser from the years 1998 through 2002, and he began his career as an investment adviser in the year 1996. Mr. Byck was the chairman or chief executive officer of Tee's To Please, Ltd., a New York corporation, from at least the year 2000, and the owner of LP Advisors, Inc., a New York corporation, from at least 2001.

5. Petitioners purchased a two-bedroom, two bath, 1,480 square foot townhouse located at Via Solano, Boca Raton, Florida, for \$165,600.00 on January 31, 2000.

6. On July 22, 2002, David Byck purchased a multi-level townhouse located at Apricot Court, Melville, Suffolk County, New York, for \$440,000.00. Petitioners moved into the Apricot Court, Melville, New York, townhouse on or about August 8, 2002. Mr. Byck made an interfamily transfer of the Apricot Court, Melville, New York, residence to himself and Leslie Byck on October 2, 2002.

7. On August 14, 2003, David and Stanley Byck sold the East 35<sup>th</sup> Street, New York, New York, apartment for \$350,000.00.

8. Petitioners filed a timely Nonresident and Part-Year Resident Income Tax Return (Form IT-203) for the year 2003, on which they listed their address as Via Solano, Boca Raton, Florida, and their county of residence as Suffolk. Part E of Form IT-203 asks part-year residents to check the box that describes their situation on the last day of the tax year. Petitioners checked “(3) moved out of New York State and received no income from New York State sources during your nonresident period.” Petitioners entered June 30, 2003 as the date of their move. Stanley T. Byck, MBA, CTP, ATA, prepared petitioners’ 2003 Nonresident and Part-Year Resident Income Tax Return.

9. The wage income of \$240,000.00, reported as part of petitioners’ federal adjusted gross income for the year 2003, was received by David Byck from LP Advisors, Inc., located at Walt Whitman Road, Melville, New York.

10. On January 27, 2004, David Byck acquired a Florida driver’s license. He also acquired Florida mortgage broker (individual) and real estate sales person licenses on February 3, 2004 and May 19, 2004, respectively.

11. On January 27, 2004, Leslie Byck acquired a Florida driver’s license. She also acquired a Florida mortgage broker (individual) license on February 3, 2004.

12. Petitioners sold their Apricot Court, Melville, New York, townhouse for \$505,000.00 on February 19, 2004.

13. On March 22, 2004, petitioners purchased a 4,683 square foot single family residence located at Versailles Boulevard, Wellington, Florida, for \$976,792.00.

14. On June 3, 2004, petitioners sold the Via Solano, Boca Raton, Florida, townhouse for \$240,000.00.

15. On their 2004 federal Schedule D, petitioners reported the following items on Part 11 Long-Term Capital Gains and Losses - Assets Held More Than One Year: a gain of \$37,419.00 (sale price of \$241,000.00 less cost or other basis of \$203,581.00) on the sale of the Via Solano, Boca Raton, Florida, property, a gain of \$17,350.00 (sale price \$505,000.00 less cost or other basis of \$487,650.00) on the sale of the Apricot Road, Melville, New York, property, and a loss of \$48,350.00 (sale price \$93,650.00 less cost or other basis of \$142,000.00) on the sale of a BMW Z8 Exotic automobile, for a net long-term capital gain of \$6,419.00.

16. For the year 2004, the following Schedule K-1 items of income were reported on petitioners' federal Schedule E: nonpassive income of \$209,650.00 from Madilex, an S corporation; nonpassive loss in the amount of \$111,549.00 from "Byck Accounting & Tax," an S corporation; and nonpassive loss in the amount of \$2,240.00 from "Stanley T Byck, MBA, Inc.," an S corporation.

17. Petitioners did not file a New York State income tax return for the year 2004.

18. On June 30, 2004, the Division sent petitioners a Request for Missing Information or Forms for tax year 2003 because they entered \$9,500.00 of City of New York tax withheld on their return, but failed to attach Mr. Byck's federal Form W-2 wage and tax statement to their 2003 Nonresident and Part-Year Resident Income Tax Return. This request asked for the completion of Form IT-360.1, if petitioners were residents of the City of New York or the city of Yonkers for part of 2003, and their wage and tax statement(s). In response to that request, Stanley T. Byck sent the 2003 Form W-2 Wage and Tax Statement issued to David J. Byck by LP Advisors, Inc., Walt Whitman Road, Melville, New York, on which state wages in the amount of \$240,000.00 and New York State tax in the amount of \$20,000.00 were reported. This Form W-2 did not report the withholding of any New York City taxes. Stanley T. Byck ,

David Byck's father, also included a letter dated July 25, 2004, addressed "To Whom It May Concern," in which he wrote: "[m]y clients, David and Leslie Byck were not residents of New York City in 2003. Therefore no NYC taxes should be assessed to them. Please remove these taxes as they are not responsible for them."

19. On September 2, 2004, the Division issued an assessment for the year 2003 in the total amount of \$9,952.22, consisting of unpaid tax in amount \$9,357.49, penalty of \$376.90 and interest of \$217.83. This assessment was issued because petitioners' timely payments or credits totaled \$37,390.00 for the year 2003, and the total tax reported on their 2003 nonresident and part-year resident income tax return totaled \$46,747.00. On or about November 30, 2005, as part of his purchase of a house in Loxahatchee, Florida, David J. Byck paid a New York State tax lien in the amount of \$11,541.69 for the year 2003.

20. On June 15, 2006, the Division commenced a general verification field audit of petitioners' personal income tax returns for the years 2003 and 2004. In her letter to petitioners dated June 20, 2006, the auditor, Randi Palmer, requested that petitioners complete an enclosed Nonresident Audit Questionnaire, a chronological history of their residence and employment, and an enclosed Form AU-262.5 for the years 2003 and 2004. In her letter, Ms. Palmer also requested complete copies of petitioners' original federal returns with all supporting schedules for the years 2003 and 2004, including schedules K-1 and W-2. In addition, Ms. Palmer advised that the Division's records indicated that a New York return for the year 2004 had not been filed and asked petitioners to either explain why the return was not filed, or if it was filed, to provide a copy of such return. She further advised that after her review of the requested information was complete, a field visit might be necessary and additional information and records might be required as the audit progressed.

21. As a result of petitioners' failure to respond to the auditor's initial letter, a second request letter was sent to petitioners on August 11, 2006. Petitioners failed to respond to that letter as well.

22. A January 5, 2007 entry in the Tax Field Audit Record (audit log) indicates that the auditor reviewed the Division's computerized personal income tax records and discovered that petitioners had filed an amended return for the year 2003. The entry further indicates that the auditor printed out copies of the 2003 amended return filed with the Division on November 16, 2006, and the accompanying documents, to wit, the Nonresident Audit Questionnaire and the auditor's initial contact letter dated June 20, 2006. The January 5, 2007 audit log entry noted that the amended income tax return for the year 2003 stated the following: "Money was taken in error by NYS. Mr. and Mrs. Byck lived in NYC for four months. In addition an error was made in the W2. A new one has been included." The auditor further noted that it appeared the amended return reduced Mr. Byck's wages from \$280,000.00 to \$209,000.00 and showed a refund of \$11,000.00.

23. The record includes a copy of the five-page Nonresident Audit Questionnaire printed out by the auditor. Typed at the top of page 1 of this nonresident audit questionnaire was the name "David J. Byck," tax years "01/01/2003 - 12/31/2004," and case # "X661193620." Handwritten answers appear in response to only 5 of the 29 separately numbered questions in this unsigned and undated nonresident audit questionnaire. Review of those answers reveals that at least two answers were unresponsive to the question asked. It is noted that no information was provided in this nonresident audit questionnaire regarding Mr. Byck's claimed residence, his business activities and locations, the dates he was in New York State and the dates he was outside New York State during the period January 1, 2003 through December 31, 2004. It is also

noted that question 28, which asked for a “complete statement relative to your intentions as to residence when you moved from New York State” and “a statement relative to your intentions to establish a home or principal place of residence,” was unanswered.

24. In a third letter to petitioners dated February 8, 2007, the auditor requested responses to her letter dated June 20, 2006, and also asked for: an explanation of the allocation of wages to New York in 2003; an explanation as to why petitioners’ 2003 income tax return claimed that they were part-year residents of Suffolk County, when the Division’s records indicated that the East 35<sup>th</sup> Street, New York, New York, apartment was sold on August 14, 2003; and an explanation of why the amended return filed for the year 2003 indicated that an error in withholding New York State tax had been made by the business owned by Mr. Byck. The auditor also requested that petitioners respond directly to her at the address at the top of the correspondence. Enclosed with the February 8, 2002 letter were, among other things, the June 20, 2006 letter and the long form audit questionnaire. Notations in the audit log indicate that petitioners did not respond to the auditor’s February 8, 2007 letter or to a letter dated April 24, 2007 that she sent to petitioners.

25. A November 9, 2007 notation in the audit log indicates that the amended income tax return for the year 2003 was referred to the auditor for review in conjunction with the audit for that year.

26. During a January 3, 2008 telephone conversation initiated by the auditor, she advised Mr. Byck that she had not received any information despite numerous letters requesting same. The auditor further advised that she would send Mr. Byck a letter requesting certain documentation. In her January 3, 2008 letter to petitioners, the auditor wrote, in pertinent part, as follows:

Pursuant to our phone conversation today, it is understood that an audit is being conducted which necessitates correspondence to me at the above address only.

\* \* \*

An amended return for 2003 was received by the Tax Department at the New York State Campus on November 16, 2006. Received with that return was a copy of my initial contact letter to you dated June 20, 2006 and the completed audit questionnaire requested in my June 20, 2006 letter. No other documentation was received.

I enclose a copy of the following:

- a. Original letter to you dated June 20, 2006
- b. Second request letter to you dated August 11, 2006
- c. Letter to you dated January 25, 2007 enclosing waiver [consent to extend the statute of limitations]
- d. Letter to you dated February 8, 2007
- e. Final request letter dated April 24, 2007

The only reply I have received is the waiver enclosed with the January 25, 2007 letter which was returned to me at the above address which is at the top of all letters sent to you.

Please provide the following:

1. Form POA-1, Power of Attorney, if a representative will be appearing or contacting us on your behalf.
2. Non-resident [*sic*] audit questionnaire.
3. Chronological history of your residence and employment.
4. A complete copy of your original federal return with all supporting schedules for each tax year, including all Schedule K-1s and W-2s.
5. Source of Schedule C receipts[.]
6. Please explain why a 2004 New York return has not been filed. If one has been filed, please provide copy of same.
7. Please explain the difference in your 2003 W-2 wages from the amount claimed on the corporate return, wage reporting, your original return and your amended return. The corporate return and wage reporting show \$280,000. Your original return shows \$240,000 and your amended return shows \$209,000.

Because you owned a New York City residence at . . . East 35<sup>th</sup> Street until August 14, 2003, and a New York State residence at . . . Apricot Court, Melville until February 19, 2004, it is necessary to provide the following for tax year 2003 to show [*sic*] clear picture of your whereabouts:

1. All credit card statements
2. Long distance telephone bills for the New York City residence
3. Long distance telephone bills for the Melville, New York residence
4. E-Z pass statements
5. Moving invoices
6. Closing statement for the sale of the Melville residence
7. Closing statement for the purchase of Florida residence
8. Detailed capital gain computation for the Melville property showing each component claimed

Additional information may be required as the audit progresses.

27. On January 29, 2008, the auditor received a packet from Mr. Byck containing the following documentation: a chronological history of employment and residence; copies of petitioners' unsigned 2003 and 2004 federal returns; the source of Schedule C receipts (LP Advisors and Syren Capital); petitioners' 2004 (nonfiled) New York State tax return; W-2 wage explanation and clarification; copies of petitioners' associated Gold Card American Express statements and billings (including the year-end summary) for the year 2003 and closing dates of January 21, 2004 and February 20, 2004; Florida office taxes 2003; copies of telephone bills for Melville, New York, and Boca Raton, Florida; a copy of the closing statement for the sale of the Apricot Court, Melville, New York, property in 2004; a detailed breakdown of all tax payments made to New York in 2003; a New York State part-year IT-203 for the year 2003 (redone and explained); and a copy of the mortgage satisfaction letter for the Boca Raton, Florida, residence that showed the original mortgage was dated February 1, 2000. In his January 16, 2008 cover letter to Ms. Palmer, Mr. Byck indicated that no audit questionnaire was "included in this paperwork," and that he was still waiting for E-Z pass statements per an enclosed request letter.

28. The "Chronological History of Residence and Employment" sent to the auditor by David Byck in January 2008 stated as follows.

Mr. & Mrs. Byck resided in both Florida and New York in 2003 and resided only in Florida in 2004.

Mr. Byck maintained offices in both NY and Florida in 2003.

The NY office was located at 734 Walt Whitman Rd Melville, NY 11747  
The Florida Office was located at 220 Congress Park Dr Delray Beach, FL

2003 residence.

In 2003 Mr & Mrs. Byck split their residence between 21122 Via Solano Boca Raton, FL 33443  
And  
31 Apricot Ct. Melville, NY 11747

From January of 2003 to Early May of 2003 the Byck's [*sic*] resided in Florida. From May through Mid December the Byck's lived primarily in Melville, NY however they spent an additional 20+ days between May and Early December in Boca Raton.

Approximately 44 days in 2003 was [*sic*] spent overseas or in states other than NY of [*sic*] Florida.

Mr. & Mrs. Byck returned to NY in mid 2003 to put both Melville and NY City properties on the Market.

29. A letter from the United States Postal Service (USPS) confirmed petitioners' temporary change-of-address request to have their mail forwarded from the Via Solano, Boca Raton, Florida, address to the Apricot Court, Melville, New York, address, beginning on April 29, 2003 and discontinuing on April 27, 2004.

30. A letter from Mr. Byck to the auditor dated January 16, 2008 was included with the telephone bills for Melville, New York, and Boca Raton, Florida. In that letter, Mr. Byck stated that he and Mrs. Byck allowed their friends, Brett and Beth Sher, to stay at the Apricot Court, Melville, New York, residence rent-free from January 2003 through May 2003. He further stated that was why the telephone bills reflected long distance calls from Florida and Melville, New York, on the same dates in 2003.

31. On April 12, 2008, the auditor received documentation regarding homeowner's insurance coverage, commencing August 8, 2002, on the Apricot Road, Melville, New York, townhouse. On or before August 9, 2002, a personal articles jewelry floater was added to the Royal Indemnity Insurance homeowner's policy on the Apricot Court, Melville, New York, townhouse.

32. By letter to petitioners dated April 22, 2008, the auditor advised that her review of the file indicated that petitioners did not change their domicile until 2004. Her letter also requested the following information about petitioners' unsigned, nonfiled nonresident and part-year resident income tax return for the year 2004:

The return shows a capital gain of \$17,350 on the sale of your Melville, New York residence, although \$10,931 was allocated to New York. If this is due to a capital loss carryover, please provide the details which show the start of the capital loss. Is this the return you intend to file with New York State and when do you intend to file it?

Subsequently, on June 18, 2008, the auditor sent a second request letter because petitioners failed to respond to the April 22, 2008 letter.

33. On August 26, 2008, the auditor received a letter from Stanley Byck, David Byck's father and accountant, and an enclosed copy of her April 22, 2008 letter. Subsequently, on October 3, 2008, the auditor received a power of attorney appointing Stanley Byck as petitioners' representative. No additional documentation was provided.

34. Based upon her review of the documents submitted during the audit, the auditor concluded that petitioners were New York domiciliaries for the year 2003 because they owned the Apricot Court, Melville, New York, residence for all of 2003 and they failed to provide clear and convincing evidence that they changed their domicile from New York to Florida.

Alternatively, the auditor concluded that petitioners were statutory residents for the year 2003

based upon the following. Petitioners maintained the Apricot Court, Melville, New York, residence and spent in the aggregate more than 183 days in New York during 2003. In addition, after concluding that petitioners changed their domicile to Florida in 2004, the auditor determined that petitioners were properly subject to tax on the capital gain from their sale of the Apricot Court, Melville, New York, residence on February 19, 2004.

35. The auditor recomputed petitioners' New York State tax liability for the year 2003 using a filing status of married filing joint return. Making no adjustment to the corrected federal adjusted gross income of \$833,612.00,<sup>2</sup> the auditor determined the corrected New York State adjusted gross income to be \$833,612.00. From this amount, the auditor subtracted corrected New York itemized deductions after modifications in the amount of \$32,047.00 and determined corrected New York State taxable income to be \$801,565.00 and the corrected New York State tax liability to be \$61,721.00. After subtracting prior tax payments of \$46,604.00 from the corrected New York State tax liability of \$61,721.00, the auditor determined the additional tax due to be \$15,117.00.

36. Because petitioners failed to answer her questions regarding their unsigned, nonfiled nonresident and part-year resident income tax return for the year 2004 that they submitted as part of their documentation during the audit, the auditor obtained petitioners' federal return report for the year 2004 from the Division's Federal Income Tax System. In reviewing that federal income tax information, the auditor found that amounts reported on petitioners' federal tax return filed for the year 2004 differed from those amounts listed on the returns submitted as part of petitioners' documentation during the audit, i.e., an unsigned copy of petitioners' federal income

---

<sup>2</sup> The corrected federal adjusted gross income determined at audit for the year 2003 and the federal adjusted gross income reported on petitioners' nonresident income tax return for the year 2003 were the same amount.

tax return for 2004 and the unsigned, nonfiled nonresident and part-year resident income tax return for 2004.

37. Based upon the information available to her and using a filing status of married filing joint return, the auditor computed petitioners' nonresident New York State tax liability for the year 2004 as follows. The auditor determined the corrected New York State adjusted gross income to be \$103,269.00. From this amount, the auditor subtracted corrected New York itemized deductions after modifications in the amount of \$64,614.00 and an allowable exemption of \$1,000.00, and determined corrected New York State taxable income to be \$37,655.00 and the New York State tax due on that amount to be \$1,858.00. The auditor then multiplied the corrected New York State income percentage of 16.80 percent<sup>3</sup> by the base New York State tax determined on audit of \$1,858.00 and determined the corrected allocated New York State tax to be \$312.00. Since there were no prior payments for the year 2004, the auditor determined the corrected New York State tax liability for the year 2004 to be \$312.00.

38. As a result of her conclusions, the Division issued a consent to field audit adjustment, dated January 9, 2009, with respect to the years 2003 and 2004. The additional tax determined to be due for each year was as follows:

Period Ended	Additional Tax	Penalties	Interest	Total
12/31/2003	\$15,117.00	\$4,006.00	\$6,580.00	\$25,703.00
12/31/2004	312.00	169.00	110.00	591.00
Total				\$26,294.00

---

<sup>3</sup> The auditor determined the corrected New York State income percentage by dividing the corrected New York adjusted gross income (state amount) in the amount of \$17,350.00, i.e., the gain on the sale of Apricot Court, Melville, New York, residence, by the corrected New York adjusted gross income (federal amount) in the amount of \$103,269.00.

The consent explained that audit adjustments were made to petitioners' tax liability for the years 2003 and 2004. The consent also explained that penalties were asserted for the years 2003 and 2004 pursuant to Tax Law § 685(b)(1) and (2) for negligence, and for 2004 pursuant to Tax Law § 685(a)(1) for failure to file on or before the due date.

39. The auditor discussed the audit findings with petitioners' representative during a telephone conference call on January 9, 2009. During that conference call, petitioners' representative disagreed with the domicile determination and indicated that he would provide any documentation that the auditor requested in a timely manner. In a letter to petitioners' representative dated January 20, 2009, the auditor requested additional information and documentation for the year 2004, consisting of supporting documentation for the capital gain claimed on the sale of the Apricot Court, Melville, New York, residence, a signed copy of petitioners' 2004 federal income tax return that was filed with the Internal Revenue Service, and an explanation of the loss on the BMW Z8 Exotic automobile and how it qualified as a loss. Petitioners' representative failed to respond to the auditor's January 20, 2009 letter.

40. After the consent to field audit adjustment was issued, no additional documentation was submitted to the auditor.

41. As noted in Finding of Fact 1, the Division issued a Notice of Deficiency to petitioners asserting additional New York State personal income tax due for the years 2003 and 2004 in the aggregate amount of \$15,429.00.

42. Petitioners filed a petition challenging the Notice of Deficiency issued for the years 2003 and 2004. In their petition, petitioners asserted that they were not full year residents of New York State in 2003. Petitioners maintained that in 2003, they lived five and one-half months in Florida and five and one-half months in New York State, and traveled in Europe for

the remaining month. They further maintained that the majority of Mr. Byck's income was earned while they were living in Florida. Petitioners claim that they came back to New York State to sell their house. Petitioners further claimed that during the months in 2003 that they were in New York State, they returned to Florida several times for several days at a time. No assertions were made in the petition regarding the tax determined to be due for the year 2004 on the capital gain that petitioners realized from the February 2004 sale of their Apricot Court, Melville, New York, townhouse.

43. The parties agreed to proceed in this matter by written submission. In support of their position that they were neither domiciliaries nor statutory residents of New York State in the year 2003, petitioners submitted the following exhibits:

a. Exhibit 1 - A copy of the County of Palm Beach: Notice of Tangible Personal Property Taxes issued to LP Advisors for the year 2003;

b. Exhibit 2 - Documentation related to the sale of the East 35<sup>th</sup> Street, New York, New York, apartment, consisting of a letter dated May 22, 2003 to David J. Byck from Scott R. Wechsler, Esq., an unsigned retainer letter dated May 22, 2003 from Mr. Wechsler, a bill dated August 14, 2003 from Mr. Wechsler for professional services rendered, a bill dated August 14, 2003 from Robert Berengarten, Esq., for professional services rendered in connection with the co-op bank loan payoff, and photocopies of 11 checks dated August 14, 2003 drawn on two separate JP Morgan Chase Bank checking accounts (10 of which are drawn on Mr. Wechsler's attorney trust account);

c. Exhibit 3 - A letter dated September 13, 2011 from Brett Sher addressed "To Whom It May Concern";

d. Exhibit 4 - A copy of an unsigned letter dated June 12, 2003 to petitioners from

Complete Recovery Restoration regarding a job proposal for water damages sustained on May 23, 2003 and an attached seven-page "Building Estimate," in the total amount of \$40,615.63;

e. Exhibit 5 - six pages of documents consisting of a copy of a canceled check, dated September 12, 2003, drawn on petitioners' Chase Manhattan Bank checking account, payable to Complete Recovery Restoration in the amount of \$24,127.68; a copy of Invoice #33837 from Carpet Mart dated October 9, 2003 regarding labor and materials to install basement carpeting at the Melville residence; a copy of the payment statement issued by ROYAL & SUNALLIANCE for a May 23, 2003 accident; a letter dated August 25, 2003 to petitioners from Countrywide Home Loans; a copy of the payment statement issued by ROYAL & SUNALLIANCE for a May 23, 2003 accident including the attached Bank of America, N.A. check dated August 1, 2003 issued by ROYAL & SUNALLIANCE Insurance Companies to petitioners and Countrywide Home Loans, Inc., in the amount of \$26,808.54; and a fax cover sheet dated October 11, 2003 to National Claims Adjustors from Leslie Byck;

f. Exhibit 6 - five pages of documents consisting of a copy of a two-page letter dated November 17, 2003 from Allen R. Morganstern, Esq., to Michael Shapiro, Esq., regarding petitioners' proposals for their possible sale of the Apricot Court, New York, premises (the enclosures referenced in the November 17, 2003 letter are not part of this exhibit); a copy of a one-page letter dated December 10, 2003 from Mr. Morganstern to Mr. Shapiro, regarding, among other things, the enclosure of fully executed contracts of sale for the Apricot Court, New York, premises and Mr. Morganstern's confirmation that the down payment check tendered by Mr. Shapiro was deposited into the law firm of Morganstern & Quatela's attorney IOLA escrow account (the enclosures referenced in the December 10, 2003 letter are not part of this exhibit); a copy of a one-page letter dated January 16, 2004 from Mr. Morganstern to petitioners regarding

an enclosed originally executed Amendment to the Contract of Sale that needed to be executed by petitioners and returned to Mr. Morganstern (the enclosure referenced in the January 16, 2004 letter is not part of the exhibit); and a copy of a letter dated August 25, 2003 to petitioners from Countrywide Home Loans (the enclosure referenced in the August 25, 2003 letter is not part of this exhibit);

g. Exhibit 7 - photocopies of two checks drawn on petitioners' Chase Manhattan Bank checking account payable to First Florida Title Services in the amounts of \$10,000.00 (dated February 6, 2003 and referencing "Lot 433/Versailles/Beaumont II") and \$47,500.00 (dated March 3, 2003);

h. Exhibit 8 - eleven pages of documents consisting of four order confirmations, three bearing dates of June 23, 2003 and one dated August 1, 2003, and seven invoices, four dated August 29, 2003, one dated January 7, 2004, one dated February 18, 2004 and one dated March 1, 2004, from Lawrence Lifland Associates regarding petitioners' purchase of some furnishings (i.e., a kitchen stool, a breakfront with console and two tables for the dining room, and a standard king four poster bed), including applicable freight charges, and window treatments for the Versailles Boulevard, Wellington, Florida, premises;

i. Exhibit 9 - an untitled three-page document described in petitioners' brief as a "detailed travel log for 2003";

j. Exhibit 10 - photocopies of David Byck's American Express Rewards Plus Gold Card statements of account (and Leslie Byck's associated account) for the period December 21, 2002 through January 21, 2004.

44. In his letter dated September 13, 2011, addressed "To Whom It May Concern," Brett Sher wrote as follows:

This letter is to inform you that my wife Beth Sher and I, lived in and maintained the property located at 31 Apricot Court Melville, NY 11747 from December 2002 to May 2003. We were the only people living at the residence during this period and this was in fact our primary residence during this time.

45. Exhibit 9 contains the following terse information for various dates in 2003: “Date Left New York”; “Date Arrived Back in New York”; “# of Days Fully out of NY”; “# of Days in NY,” and “Description” (i.e., a named geographic location including, among other places, New York, Florida, New Jersey, London, Barcelona and Aruba). The last page of this document contained the following day counts: “Total Days Fully Out of NY State” 187, and “Total Number of Days in NY State” 179. According to this document, the first 121 days of 2003, i.e., January 1, 2003 through April 30, 2003, allegedly were days fully out of New York State in Florida.<sup>4</sup> The record is silent regarding the source documentation used to prepare this three-page document. The record does not include the affidavit of the preparer of this document or the affidavits of the alleged travelers.

46. The following New York expense charges appeared on the American Express Gold Card statements related to David Byck’s account number during the period January 1, 2003 and April 30, 2003:

- a. January 3, 2003, February 3, 2003, March 3, 2003, and April 3, 2003 - Club fees for New York Sports - East, New York, New York;<sup>5</sup>
- b. January 31, 2003 - An Orbitz charge for a Delta Airlines Flight from Fort Lauderdale, Florida, to J F Kennedy Airport, date of departure February 10, 2003 (no return date listed) for passenger

---

<sup>4</sup> The year 2003 was not a leap year and there were 120 days from January 1, 2003 through April 30, 2003. As such, the number of days allegedly fully out of New York State is overstated by one day.

<sup>5</sup> New York Sports - East, New York, New York, club fees were also charged to David Byck’s American Express Gold Card on May 5, 2003, June 3, 2003 and July 3, 2003.

D. Byck;

c. February 11, 2003 - Food and beverage charge at Angelo & Maxie, New York, New York;

d. February 12, 2003 - two food and beverage charges at McFaddens, New York, New York;

e. February 28, 2003 - A Jet Blue charge for a flight from Fort Lauderdale, Florida, to J F Kennedy Airport, date of departure March 17, 2003 (no return date listed) for passenger David Byck;

f. March 17, 2003 - Food and beverage charge at Pino's Restaurant, New York, New York;

h. March 18, 2003 - Food and beverage charge at Houlihan's #159, New York, New York;

i. March 21, 2003 - A Jet Blue charge for a flight from Fort Lauderdale, Florida, to J F Kennedy Airport, date of departure March 28, 2003 (no return date listed) for passenger David Byck.

Further review of Mr. Byck's American Express Gold Card statements for the period January 1, 2003 through April 30, 2003 reveals that after the February 12, 2003 New York City restaurant charge, the next item charged to his account was a February 16, 2003 food and beverage charge at Mario's of Boca Raton, Florida. It is also noted that after the March 18, 2003 New York City restaurant charge, the next items charged to Mr. Byck's account number were two National Compliance, Del Ray Beach, Florida, charges on March 20, 2003.

47. The following charges appear on the American Express Gold Card statements related to Leslie Byck's associated account number for the period January 21, 2003 through February 19, 2003: a \$61.85 charge at Melville Florist, Melville, New York, on January 24, 2003 and a \$3,500.00 charge at AZ Restaurant, New York, New York, on January 29, 2003. It is noted that both Verizon New Jersey automatic payments, related to the Apricot Court, Melville, New York, telephone number, and Culligan Commack, Commack, New York, charges were recurring charges to Mrs. Byck's associated Gold Card number during the year 2003.

48. Review of the Verizon telephone bills for the Apricot Court, Melville, New York, telephone number reveals that a number of domestic long distance telephone calls were placed from the Apricot Court residence after 9:00 P.M. on August 3, 2003 (one call to New Jersey) and August 5, 2003 (two calls to Fallston, Maryland and three calls to Chicago, Illinois).

49. The record does not include any travel itineraries, airline tickets or hotel bills for the year 2003. It also does not include petitioners' personal and business diaries, or any work logs for the year 2003. Copies of petitioners' passports are not part of the record.

50. The record does not include copies of petitioners' canceled checks and bank statements for the year 2003. The record also does not include any moving bills.

51. In this proceeding, petitioners did not submit any documentation related to the Division's determination that for the year 2004, tax was due on the capital gain from the sale of their Apricot Court, Melville, New York, residence on February 19, 2004.

#### ***SUMMARY OF THE PARTIES' POSITIONS***

52. With respect to the issue of domicile, in their brief, petitioners assert that, as of December 2002, they decided to sell all of their property interests in New York State, and make Florida their permanent residence and domicile. Petitioners further assert that they decided to relocate to Florida because Mrs. Byck's family moved to Florida and Mr. Byck's business was located in Florida. They maintain that prior to going to Florida in December 2002, the East 35<sup>th</sup> Street, New York, New York, apartment was emptied of all of its contents. Petitioners further maintain that after the real estate broker showed the empty apartment for several months, it went under contract in May 2003 and finally sold in August 2003. As for the Apricot Court, Melville, New York, townhouse, petitioners contend that they decided to sell it as well but prior to doing so, their close friends Brett and Beth Sher, asked if they could rent the townhouse for a few

months as they were between residences. Petitioners maintain that they rented the Apricot Court, Melville, New York, townhouse to Mr. and Mrs. Sher from December 2002 to May 2003.

Petitioners assert that in early 2003, they decided to purchase and build a house in Wellington, Florida, and that they made two purchase deposits totaling \$57,500.00, an initial deposit of \$10,000.00 on February 6, 2003 and a second deposit of \$47,500.00 on March 7, 2003.

Petitioners aver that they drove back from Florida to New York in May 2003 and stayed at their Apricot Court, Melville, New York, townhouse for the first weeks in May 2003. Upon deciding to sell the townhouse themselves, petitioners claim that they scheduled their first showings for the weekend of May 24, 2003 and May 25, 2003. However, they contend that those showings did not take place because the Apricot Court, Melville, New York, townhouse sustained flood damage on May 23, 2003 while they were in Las Vegas, Nevada. Petitioners assert that the repairs to the townhouse began in late June 2003 and were not finished until October 2003, during which time the townhouse was uninhabitable. They maintain that from May 23, 2003 through September 22, 2003, when they were not in Florida or traveling, they stayed in New York at friends houses or family members houses. Petitioners contend that they moved back into the Apricot Court, Melville, New York, townhouse on September 22, 2003 and put it on the market in October 2003. They further contend that by November 2003 the townhouse was under contract and was ultimately sold in early 2004 but they emptied the townhouse and left New York on December 20, 2003.

53. With respect to statutory residency, petitioners assert, in their brief, that they were not statutory residents of New York in 2003 because they were not in New York for over 183 days, and they did not have a permanent place of abode in New York for more than 11 months.

Petitioners maintain that in 2003, they spent 179 days in New York State, many of which were

just partial days, i.e., days on which they flew out of New York airports. They further maintain that the detailed travel log for 2003 (petitioners' exhibit 9) accounts for all full and partial days that they were in New York and that their American Express statements for 2003 (petitioners' exhibit 10) confirm location and travel. Petitioners also claim that after the East 35<sup>th</sup> Street, New York, New York, apartment was sold on August 14, 2003, the Apricot Court, Melville, New York, townhouse continued to be uninhabitable until September 22, 2003. During that time period, petitioners assert that they traveled abroad and when in New York, they stayed with friends and various family members. As such, they did not maintain a permanent place of abode in New York for more than 11 months.

54. The Division contends that petitioners failed to carry their burden of proving, by clear and convincing evidence, their claimed change of domicile from New York to Florida during the year 2003. It maintains that petitioners continued uninterrupted access, maintenance and personal use of their historic domicile located at Apricot Court, Melville, New York, throughout the year 2003. The Division further maintains that there is no evidence in the record that petitioners' personal choice to allegedly offer temporary housing to their friends limited petitioners' ownership and access to their domicile. In addition, the Division points out that petitioners concede that they returned to their Melville, New York, domicile in May 2003. The Division also asserts that the record clearly shows that Mr. Byck maintained active business ties to New York in 2003. It points out that petitioners, in exhibit 9, admitted to being present in New York for 179 days in 2003, and in various other locations on the remaining days of the year. As such, the overwhelming majority of petitioners' time was spent in New York during the year 2003. The Division maintains that the record is not detailed concerning petitioners' near and dear items and also does not contain any moving documents. It also maintains that the record

contains scant evidence concerning petitioners' family. The Division points out that petitioners' brief contains the vague claim that their intended move to Florida was predicated upon Mrs. Byck's family. It also points out that petitioners, in their brief, claim that during a brief period of time in 2003, when in New York, they stayed with friends and various family members.

55. The Division also maintains that petitioners failed to meet their burden of proving by clear and convincing evidence that they did not spend in the aggregate more than 183 days in New York during the year 2003. It points out that petitioners, to substantiate their whereabouts on a day-to-day basis during 2003, submitted an incomplete summary compiled noncontemporaneously (petitioners' exhibit 9) that was vague and addressed only the period from May 2003 through December 2003. The Division further points out that petitioners failed to submit any contemporaneous records detailing their whereabouts for any day during the year 2003. As for petitioners' claim that their Apricot Court, Melville, New York, domicile was uninhabitable "for several months" and that they could not move back into it until September 22, 2003, the Division contends that petitioners' explanations in their brief concerning this portion of 2003 are vague and inconsistent. The Division asserts that petitioners' inconsistent and unsupported explanations concerning their house guests and their home renovations do not change their continual maintenance of a permanent place of abode during the year 2003. Therefore, the Division maintains that petitioners failed to meet their burden of proving by clear and convincing evidence that they did not maintain a permanent place of abode in New York during the year 2003.

56. With respect to the year 2004, the Division maintains that petitioners failed to timely file a New York State personal income tax return and failed to report capital gain from the sale of their New York residence. It points out that petitioners admit that they sold their Apricot Court,

Melville, New York, townhouse in February 2004. The Division further points out that petitioners have failed to submit any evidence in this proceeding to dispute the Division's presumptively correct determination for the year 2004. Therefore, the Division asserts that petitioners failed to carry their burden of proving by clear and convincing evidence that they did not fail to properly allocate capital gains from the 2004 sale of their residence located at Apricot Court, Melville, New York. The Division also maintains that petitioners failed to prove that reasonable cause exists to abate the negligence penalty imposed for the years 2003 and 2004 and the failure to file on or before the due date penalty imposed for the year 2004.

57. In their reply brief, petitioners assert that at the end of 2001, Mr. Byck started LP Advisors, Inc., a hedge fund consulting firm that was in business to help hedge funds with their trading strategies. They further assert that LP Advisors, Inc., had five clients, two of which were located in Palm Beach County, Florida. Petitioners maintain that sometime in 2002, due to LP Advisor, Inc.'s rapid growth, Mr. Byck brought in four partners, all of whom were located in Palm Beach County, Florida, and at the end of 2002, the company opened its Del Ray Beach, Florida office. They further maintain that due to the company's fast growth and the fact that Mr. Byck's partners and two of the company's biggest clients were located in Palm Beach County, Florida, Mr. Byck needed to relocate to Florida because he needed to control the company's daily operations. Petitioners claim that they had every intention of making Florida their new home when they left New York in December 2002 for business reasons. Petitioners also claim that they had extensive family who lived full time or part time in Florida including their parents, grandparents, aunts and uncles. They assert that in 2003, all three levels of the Apricot Court, Melville, New York, town house sustained flood damage, which included a huge hole between the 1<sup>st</sup> and 2<sup>nd</sup> floor. Petitioners further assert that during the renovations, all plumbing had to be

shut off and all floors and two levels of ceiling and walls had to be knocked down. They maintain that the Apricot Court, Melville, New York, townhouse could not be lived in because of the lack of plumbing and the significant damage. Petitioners claim that during the time in which the Apricot Court, Melville, New York, townhouse was being repaired, they did a lot of traveling, most of which was business related. They further claim that when they were not traveling to meet with clients or prospective clients or friends, they were in New York, staying with some friends, and Mr. Byck's parents, who lived part year in New York and part year in Florida. Petitioners maintain that they moved their near and dear items, i.e., their jewelry, their wedding album, Mr. Byck's grandparents' china and Mr. Byck's BMW Z-8 sports car, to Florida in December 2002. They claim that when they left New York in December 2003, the only furnishings they took from the Apricot Court, Melville, New York, townhouse were couches, a downstairs table and a second bedroom set, because the flood destroyed much of their furniture and they gave their bedroom set to Mrs. Byck's parents. Petitioners contend that they were not in New York at all from January 1, 2003 through May 1, 2003. They claim that the travel log (petitioners' exhibit 9) is accurate and the American Express Gold Card statements (petitioners' exhibit 10) verify the dates listed in that log.

58. Petitioners did not address, in either their brief or their reply brief, the Division's determination of additional tax due for the year 2004. Petitioners also did not address the imposition of penalties for the years 2003 and 2004.

### ***CONCLUSIONS OF LAW***

A. At the outset, I note that in proceedings in the Division of Tax Appeals a presumption of correctness attaches to a notice of deficiency and the petitioner bears the burden of overcoming that presumption (*see e.g. Matter of Estate of Gucci*, Tax Appeals Tribunal, July 10,

1997, citing *Matter of Atlantic & Hudson*, Tax Appeals Tribunal, January 30, 1992; *see also* Tax Law § 689[e]).

B. Tax Law § 601 imposes New York State personal income tax on “resident individuals.” Tax Law § 605(b)(1) sets forth the definition of a New York State resident individual for income tax purposes as follows:

A resident individual means an individual:

(A) who is domiciled in this state, unless (i) the taxpayer maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state . . . , or

(B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States.

The classification of resident versus nonresident is significant, since nonresidents are taxed only on their New York State source income, whereas residents are taxed on their income from all sources.

C. The first question to be addressed is whether petitioners maintained a permanent place of abode in New York State in 2003. “Permanent place of abode” is defined as a “dwelling place of a permanent nature maintained by the taxpayer, whether or not owned by such taxpayer, and will generally include a dwelling place owned or leased by such taxpayer’s spouse” (20 NYCRR 105.20[e][1]).

David Byck purchased the Apricot Court, Melville, New York, townhouse on July 22, 2002. Petitioners moved into the Melville townhouse on or about August 8, 2002. Mr. Byck made an interfamily transfer of the Melville residence to petitioners on October 2, 2002, and they continued to own it until February 19, 2004. They paid the mortgage, the real estate taxes, and

the utilities, had unrestricted access to the dwelling and maintained it. There is no evidence that petitioners' use of the Melville residence was restricted during the year 2003. The record clearly shows that petitioners allowed Mr. and Mrs. Sher to temporarily stay in the Melville residence rent-free. In addition, petitioners concede that they returned to the Melville residence in May 2003. Petitioners thus clearly maintained a permanent place of abode in New York State during the year 2003.

D. The Division's regulations define "domicile," at 20 NYCRR 105.20(d), in relevant part as follows:

(1) Domicile, in general, is the place which an individual intends to be such individual's permanent home - - the place to which such individual intends to return whenever such individual may be absent.

(2) A domicile once established continues until the individual in question moves to a new location with the bona fide intention of making such individual's fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of such individual's former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, such individual's declarations will be given due weight, but they will not be conclusive if they are contradicted by such individual's conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicated that such individual did this merely to escape taxation.

\* \* \*

(4) A person can have only one domicile. If such person has two or more homes, such person's domicile is the one which such person regards and uses as such person's permanent home. In determining such person's intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. It should be noted however, as provided by paragraph (2) of subdivision (a) of this section, a person who maintains a permanent place of abode for substantially all of the taxable year in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though such person may be domiciled elsewhere.

(5)(I) Husband and wife. Generally, the domicile of a husband and wife are the same.

The classic distinction between domicile and residency was explained many years ago by the Court of Appeals in *Matter of Newcomb's Estate* (192 NY 238, 250 [1908]):

Residence means living in a particular locality, but domicile means living in that locality with the intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.

It is well established that an existing domicile continues until a new one is acquired and the party alleging the change bears the burden to prove, by clear and convincing evidence, a change in domicile (*see Matter of Bodfish v. Gallman*, 50 AD2d 457, 378 NYS2d 138 [1976]).

Whether there has been a change of domicile is a question “of fact rather than law, and it frequently depends upon a variety of circumstances which differ as widely as the peculiarities of individuals” (*Matter of Newcomb's Estate*). The test of intent with regard to a purported new domicile is “whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it” (*Matter of Bourne*, 181 Misc 238, 41 NYS2d 336, 343 [1943], *affd* 267 App Div 876 [1944], *affd* 293 NY 785 [1944]); *see also Matter of Bodfish v. Gallman*). While certain declarations may evidence a change in domicile, such declarations are less persuasive than informal acts which demonstrate an individual's “general habit of life” (*Matter of Silverman*, Tax Appeals Tribunal, June 8, 1989, quoting *Matter of Trowbridge*, 266 NY 283, 289 [1935]).

E. In this instance, the record shows that historically, petitioners filed income tax returns as residents of New York State. Beginning in 2002 and continuing until February 2004, petitioners maintained their historic domicile located at Apricot Court, Melville, New York. The

record shows that petitioners spent a significant amount of time in New York State in 2003. Although petitioners purchased the Via Solano, Boca Raton, Florida, townhouse in January 2000, the record lacks any evidence of petitioners' historic use of that Florida residence. The record also lacks any sense of the "sentiment, feeling and permanent association" with which petitioners regarded that Florida residence (*see Matter of Bourne*). The Division's regulations provide that where an individual has more than one home the length of time customarily spent at each location is an important factor in determining domicile (*see* 20 NYCRR 105.20[d][4]). The record also shows that during 2003, Mr. Byck earned substantial income from New York corporations that he owned. Active business ties have been considered an indication of a failure to abandon a New York domicile (*see Matter of Kartiganer v. Koenig*, 194 AD2d 879, 599 NYS2d 312 [1993]).

Other than allegations set forth in their brief and reply brief, this record contains no evidence as to petitioners' intent to abandon their New York State domicile and acquire a new one in Florida. Petitioners did not submit affidavits concerning their intent. Nor were affidavits from any persons fully familiar with petitioners submitted. The lack of evidence to support petitioners' position necessitates the conclusion that they failed to carry their burden of showing, by clear and convincing evidence, that they effected a change of domicile (*see Matter of Estate of Gucci; Matter of Labow*, Tax Appeals Tribunal, March 20, 1997). Petitioners were therefore properly subject to tax as resident individuals of New York for the year 2003 pursuant to Tax Law § 605(b)(1)(A).

F. Having concluded that petitioners were properly subject to tax as New York State domiciliaries, it is not necessary to address whether petitioners have met their burden of proving by clear and convincing evidence that they were not present in New York State for more than 183

days in 2003 and thus not subject to tax as “statutory residents” pursuant to Tax Law § 605(b)(1)(B).

G. As noted above, petitioners sold their Melville residence in February 2004 and realized a capital gain on that sale. However, petitioners did not file a New York State personal income tax return for the year 2004 prior to the commencement of the Division’s audit of petitioners’ New York State personal income tax returns for the years 2003 and 2004. During the course of the audit, petitioners submitted an unsigned (nonfiled) nonresident and part-year income tax return for the year 2004, and an unsigned copy of their 2004 federal income tax return. The auditor requested additional information regarding the year 2004. However, petitioners failed to submit any additional documentation or to file the 2004 nonresident and part-year resident tax return. Based upon all available information, the Division determined that petitioners failed to file a 2004 nonresident and part-year resident income tax return and report the capital gain from the sale of their Melville residence on such return. A consent to field audit adjustment was issued reflecting the Division’s determination for the year 2004. Petitioners did not submit any information to adjust the consent to field audit adjustment issued with respect to the year 2004. Subsequently, in addition to assessing a deficiency for the year 2003, the Notice of Deficiency issued to petitioners assessed additional tax due for the year 2004 in the amount of \$312.00 plus penalty and interest. Pursuant to Tax Law § 681(a), the Notice of Deficiency was properly issued for the year 2004.

H. As noted above, petitioners waived their right to a hearing in this matter and agreed to have this controversy determined on submitted evidentiary documents. However, petitioners introduced no evidence which would support either the unreasonableness of the assessment for the year 2004 or the incorrectness of the tax assessed for that year. Accordingly, petitioners

failed to sustain their burden of proving that the deficiency assessment for the year 2004 was improper.

I. The Division imposed penalties in the instant matter pursuant to Tax Law § 685(a)(1), for failure to file a tax return for the year 2004, and Tax Law § 685(b), for negligence for the years 2003 and 2004. Petitioners bear the burden of proving that the failure to file was due to reasonable cause and not due to negligence (Tax Law § 685[b]; § 689[e]). Tax Law § 685(b) requires the imposition of penalties if any part of a deficiency is due to negligence or intentional disregard of Article 22 of the Tax Law or the regulations promulgated thereunder. Petitioners failed to articulate any rationale for abatement of the penalties imposed for the years 2003 and 2004. Therefore, the imposition of penalties is sustained.

J. The petition of David and Leslie Byck is denied and the Notice of Deficiency dated March 5, 2009 is sustained.

DATED: Albany New York  
October 25, 2012

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE